IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 16TH JULY 2007 / 25TH ASHADHA 1929

CRL.A.No. 251 of 2007(B)

SC.158/2002 COURT OF THE ADDL.DISTRICT AND SESSIONS COURT (ADHOC), FAST TRACK COURT-I PATHANAMTHITTA

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APPELLANT:

RAMAKRISHNAN, S/O.THANKAPPAN,
C.NO.9459, CENTRAL PRISON,
TRIVANDRUM.

BY ADV. SRI.LIJU. M.P

RESPONDENT:

STATE OF KERALA, REPRESENTED
BY THE PUBLIC PROSECUTOR, HIGH
COURT OF KERALA AT ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MOHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16/07/2007, THE COURT ON 16/07/2007 DELIVERED THE FOLLOWING:

K. Thankappan, J.

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Crl. A. No. 251 of 2007

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Dated this the 23rd day of July, 2007

JUDGMENT

Accused in S.C.No.158/2002 on the file of the Court of the Addl. District and Sessions Judge (Adhoc) Fast Track Court-I, Pathanamthitta is the appellant. He was charge-sheeted for the offence punishable under section 55(a) of the Abkari Act. The prosecution allegation against the appellant is as follows:- On 27-7-1999 at 3.30 P.M. PW4 S.I. of Police and party of Konny Police Station had found the appellant engaged in sale of arrack sitting in a chair in the front courtyard of his house No.VII/46, Kallumpurathu Puthen Veedu, Iravon Village, Konnithazham Muri, Konny Panchayat. It was also alleged that the appellant was found keeping in possession of 5 litres of arrack in MO1 can. To prove the allegation, the prosecution examined PWs.1 to 4 and Exts.P1 to P18 and MO.I were marked. When the appellant was questioned under section 313 Cr.P.C.. he denied the allegation levelled against him and stated that he had not involved in the commission of the offence as alleged by the prosecution. The appellant also stated that he was arrested from Painavann Market and the house stated in Ext.P1 do not belong to him. Relying on the evidence adduced by the prosecution, the trial court found that the appellant was

guilty of the offence punishable under section 55(a) of the Abkari Act and he was convicted thereunder and sentenced to undergo simple imprisonment for one year and also to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment for two years. The above conviction and sentence awarded against the appellant are under challenge in this appeal.

2. The appeal is filed through the jail authorities. As no counsel has been engaged to defend the case of the appellant, this Court appointed a member from the State Brief panel to defend the case of the appellant.

3. This Court heard learned counsel for the appellant and the learned Public Prosecutor.

4. Learned counsel for the appellant has taken three contentions to challenge the judgment under appeal. Firstly, it is contended that the prosecution case is that the appellant was found in possession of 5 litres of arrack, whereas the evidence of PWs.1 to 3 would show that no seizure was made from the possession of the appellant. Secondly, it is contended that the prosecution has failed to prove that the possession of the arrack was in the course of imports, exports, transport or transit as contemplated under section 55(a) of the Abkari Act. To substantiate the above contention the learned counsel for the appellant relies on two decisions reported in

Surendran V.State of Kerala (2004(1) KLT 404 , Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631) . The third contention of the learned counsel is that the evidence of PWs.1 and 4 cannot be accepted, as the evidence of Pws.2 and 3 would show that the appellant was not arrested from the scene of occurrence.

5. The prosecution case that on 27-7-1999 at 3.30 P.M. PW4, S.I. of Police, had received reliable information that the appellant was engaging in sale of illicit arrack. They proceeded to the house of the appellant. They found the appellant was sitting in a chair in the front courtyard of his house and the appellant poured a liquid from MO1 can into the glass and given the glass to the other person. On seeing the police party, the appellant ran away. He was prevented and MO1 was taken in the presence of PWs.2 and 3 from the appellant. On examination, it was found that MO1 can contained 5 litres of illicit arrack. This fact was spoken to by PW1. The appellant was arrested and Ext.P4 arrest memo was prepared. Ext.P1 mahazar was prepared and PWs.2 to 4 independent witnesses had signed in Ext.P1 mahazar. PWs.1 to 4 identified the appellant as the person from whom MO1 can was seized with 5 litres of arrack. Considering the evidence adduced by the prosecution, the trial court found that “the prosecution has succeeded in establishing the case of the accused being found keeping possession of

illicit arrack of 5 litres with him in MO1 can".

6. Question to be considered is whether the appellant has committed an offence punishable under section 55(a) of the Abkari Act ?

7. In Surendran's case (Supra) this Court held that the case should fall within the ambit of section 55(a) only when a person was found to be in possession of liquor in the course of import, export, transport or transit of the goods. The prosecution case is that the appellant was found in possession of 5 litres of arrack and also he was found in selling arrack to another person. If that be so, the principle laid down by this Court in the above two decisions is applicable in the facts and circumstances of this case. In Sudhepan's case (Supra) this Court held that under section 55(a) of the Abkari Act the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transit of liquor. Apart from the above two decisions, the learned counsel for the appellant relies on a Division Bench decision of this Court reported in Mohanan V. State of Kerala (2007(1) KLJ 436). In the above decision this Court held that section 55(a) is applicable only when person illegally imports, exports liquor or in possession of liquor while illegally importing it. The prosecution int his case has not proved that the possession of the contraband article was incidental or in connection with

export, import, transport or transit of liquor. If that be so, the finding of the trial court that the appellant has committed an offence punishable under section 55(a) of the Abkari Act is not sustainable.

8. Question to be considered is whether or not the prosecution has succeeded in proving that the appellant was found in possession of 5 litres of illicit arrack in MO1 can and he is liable for any offence?

9. The evidence of PW1 would show that there was another person standing near the appellant and he run away with the glass. The prosecution has not taken any attempt to identify that person. Further PW4 had not stating anything about the glass in which the appellant alleged to have poured the liquor. In the above circumstances, this Court is of the view that the allegation that the appellant was found in engaging sale of arrack has not been proved by the prosecution.

10. The case of the appellant is that he was arrested from Painavann Market and nothing was seized from him. The fact that the independent witnesses who signed Ext.P1 mahazar turned hostile to the prosecution. They stated that they had not signed Ext.P1 mahazar at the scene of occurrence, but they stated that they had signed paper at the police station. These witnesses also sated that they had not seen the appellant in the scene of occurrence. If that be so, the evidence of PW4 and PW1 regarding the

seizure of MO1 is doubtful. PW4 had a definite case that the appellant was sitting in a chair in the front courtyard of his house. However, there is no evidence forthcoming from the side of the prosecution that the house belongs to the appellant. In the circumstances, the seizure of MO1 can, as alleged by the prosecution, cannot be accepted. Apart from the above, it has to be noted that when MO1 can was produced before the court, there was no legal or signature of PW4. It has also come out in evidence that MO1 is a broken can which could not be identified by any of the witnesses. It is relevant to note that there was a mistake in the measurement of sample taken. So, there is ground to give benefit of doubt to the appellant.

12 In the result, the conviction and sentence passed against the appellant/accused in Sessions Case No.158/2002 on the file of the Court of the Addl. District and Sessions Judge (Adhoc) Fast Track Court-I, Pathanamthitta are set aside and the appellant is acquitted. Hence, the appellant, shall be released forthwith unless required in any other case.

K. Thankappan,
Judge.

K. Thankappan,J.

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Judgment

16-7-2007